

7. CONCLUSIONS

We conclude with several broad positions that underline our stand on the support of Bill and Keep, or Zero Access, and its broadening into the area of overall Interconnect Policy, including a broadening of IEC status and the questionable position of CMRS as well as the evolving status of the Disaggregator in the local telecommunications market.

It is assumed that competition and innovation are essential and that commoditization of the service is achievable. Based upon these factors the policies developed allow for balanced and full competition.

Technological Innovativeness

Technological Competitiveness is enhanced by allowing the maximum numbers of players into the provision of local exchange. It is clear as we have demonstrated that the regulated monopoly is neither incentivized nor conditioned to build and create new and competitive technologies.¹⁵ In fact, the rate of return mentality rewards lack innovation and capital intensiveness. The development of the new PCS players as well as the development of multiple Disaggregators will dramatically expand this competitive environment through the application of technological alternatives. The technologies will reduce costs of access by using interconnect means and methods that are dramatically different from the existing RBOC. The new competitor should not be penalized for these costs of past choices.

Anti-competitive Factors

It has been demonstrated by the RBOCs and GTE in the LEC and Cellular markets that they have in combination, in such markets as Boston, controlled both wire and wireless services (NYNEX and Southwest Bell), and have overtly monopolized the residential telecommunications Local access, and that if they are permitted to bid for PCS bandwidth, performance of that monopolistic position may be able to bid in a fashion that may preclude other competitors, and as such this may have a detrimental effect in interstate communications and commerce, and as such may possibly be viewed as in violation of antitrust laws.

¹⁵ See the references by Murowaya and those by Thurow, pp. 160-190. The relationship between this effort and what MITI does in Japan is striking. Here the U.S. is taxing entrepreneurs for the development of infrastructure. In addition the U.S. may be supporting an unbearable burden of a monopoly player that further adds to risk. In Japan, the MITI Industrial Policy works differently. The current proposed approach is the extreme in capital, allowing the smaller entities to pay for the right while still bearing the burden of dealing with entrenched competitors.

The issue, then, is; can the U.S. Government act in a fashion supporting the LECs interests and create an environment that lacks competition?¹⁶ Admittedly the monopoly structure was acceptable with the old technology that clearly showed economies of scale and scope.¹⁷ The new technologies, as has been shown, do not have scale and scope. Thus the monopolist positions of the LEC are such as to merely eliminate the existence of any future competitor. The question is; what role is the Government playing in this process? In fact, can the Government, by recognizing the monopolistic nature of the market, recognizing the change that technology can and should play in developing competition, create a risk sharing allocation procedure that is Pareto Optimal?¹⁸

Consumer Choice

¹⁶ Hovencamp, Antitrust (1977), pp. 740-742. Under the doctrine developed in Noerr, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed 2nd 464 (1961), the LECs can petition the Government in their monopolistic interests. However, the question is one of acting in such a direct and overt fashion that could place the Government in the role of market maker and controller to the detriment of both the potential competitors and the consumers. Also in Areeda & Kaplow, pp. 413-414, the case of California Motor Transport Co. v. Trucking Unlimited 404 U.S. 508 (1972) placed a limit on the level of that influence. That level was one of fair and proper representations and the ability to obtain recourse under such circumstances. The question herein is one that asks if the LEC can fairly represent the continuation of the monopoly structure both de facto and de jure.

¹⁷ Hovencamp (1985) pp. 32-36 discusses the issues of natural monopoly as having both scale and scope plus the limited amount of sunk costs and the ability to transfer assets. Under Clayton Section 7, the authority to regulate the monopoly has been given to the FCC. In Brenner, p. 91, "the Commission in... 84 F.C.C. 2d 445 (1981) determined that congressional intent underlying the act was to ensure universal service by limiting the market power of dominant carriers. Title II regulation of non dominant carriers could well contradict Congress's goals...". The issue before the Commission is in effect the issue of the structural elimination of market dominance by means of technological innovation supported by a de facto Fiscal Policy via the Auction process. It is argued that under Sherman, with the issue of natural monopoly in serious question, and under Clayton and Robinson Patman with regard to pricing, specifically the fact that access fees are internally transferred at less than long term average costs, that it will be necessary for the Congress and the Commission to review the issues of authority to permit the LECs to even be active bidders in the process of new spectrum allocation.

¹⁸ It should be noted that this is comparable to the evolution of the railroads and the airlines. Ironically it was during the Administration of Franklin D. Roosevelt that the railroad found competition from the airlines. The Administration in that period could have taken the position that the Government should protect the quasi monopoly structure of this "Transportation" industry and should not encourage the new interlopers. After all, it was the depression and as railroads lost business employees would loose jobs. Roosevelt, instead, fostered this new industry, using highly competitive Postal and Mail Delivery contracts. The net result was that the US Government during this administration fostered the technology that was to become a dominant element in the export trade of the United States for the Past sixty years. The same opportunity presents itself to the current administration. Instead of "Taxing" the risk takers or instead of immortalizing the monopolists, the Administration can empower the entrepreneurs to create the technology base for the next fifty years.

By allowing for the maximum amount of competition it will allow for the most creative solution and provision of new services to the consumer. Innovation is clearly attributed to the smaller entrepreneurial companies. All one has to do is look at the LECs and see how lithe they have done with ISDN to understand what would result if they had monopoly control over PCS.

Market Competition

Market competition has positive and negative effects. It drives prices down and leads to innovation. Clearly the competition in the IEC market has benefited the consumer. It has also benefited AT&T. The competition that could come from the PCS markets will help to reinvigorate the Local Exchange with lower prices, improved efficiencies and better services.

CMRS can become a common carrier. All this implies is that CMRS or PCS is open to any subscriber and that the provider cannot discriminate on the sale of the service. Common Carriage does not imply tarrifing. It is anticipated that all PCS providers will be common carriers.¹⁹

There are three issues that are drivers in the evolving concept of common carriage as applied to a competitive local exchange environment. Specifically:

Universal Service: Universal Service was a Theodore Vail desire that was based upon Vail's desire to obtain a national monopoly. Vail promised this to Congress and the ICC to assure his ability to get the national monopoly for AT&T. This latter became a public policy issue for the PUCs as they increased their powers over the LECs. Universal service may not mean universal competition. The RBOCs will argue cream skimming for the alternative carriers and will argue that the RBOCs must serve the rural customer, leaving the more profitable, and possibly only profitable, customer in the urban area where competition exists. The issue of universal service does not demand universal competition. Namely, universal service means that as a public policy issue, the total infrastructure may have to deal with providing service to all who are citizens and can afford a lifeline type of service. This may be handled by a fiscal or taxation approach, separate and apart from the running of a business, thus leveling the field for all of the players.

Common Carrier Status in a Competitive Environment: A common carrier as defined by Brenner in the context of the 1934 FCC Act is:

¹⁹ The Commonwealth of Massachusetts issued the first PCS Common Carrier Certification, without restriction, to Telmarc Telecommunications on August 23, 1993. This is the first of its kind. TTI subsequently filed for co-carrier status.

"...a communications common carrier is defined under the law as one whose services are open to public hire for handling interstate or international communications by electrical means. Broadcast stations are not considered common carriers. "

Thus any CMRS or PCS carrier is obviously a common carrier. It will, by its very nature cross state lines. As such, it is under the common carriage restrictions of the FCC. In contrast to the LECs, who are also common carriers, the PCS companies are not in monopoly positions. They must compete in an open market with the existing carrier. Yet, as we have shown, cost of good not withstanding, the PCS carriers do not have business with significant scale. They may enter the market with de minimis capital as compared to wire based carriers. The technology change allows this to happen. The only barrier to entry is the access fee. A competitive environment can then ensue if and only if the access fee is made competitive. The only way for this to occur that is the least disruptive appears to the use of the co-carrier status.²⁰

Regulation without Tariffs: If CMRS and PCS and other wireless type service create a truly competitive market for local exchange service, then there is the question of what is the function of regulation and what are the roles of the state PUCs. Tariff regulation was predicated upon the need to have a monopoly due to the dramatic economies of scale and scope in local carriage. As we have shown here and elsewhere, these economies are de minimis. Thus, the justification for a monopoly are no longer valid. It was technology that allowed this to occur. What then is left for the PUC to regulate. This is not the case of CATV with many systems but each having a monopoly. It is a case of many systems, each having multiple presences. The role of regulation therefore is to ensure competition and to ensure that the quality promised is met. Namely, the role is that of consumer advocate and market policeman.

The evolving policy directions that handle these factors are the development of a co-carrier concept and the resulting elimination of the settlements process. Consider first the co-carrier status. A co-carrier is any local exchange service provider whose customers have common carrier access to their local exchange provider and desire access to other common carrier providers in a competitive environment. A common carrier can become a co-carrier by acclamation and by operation. The net result of co-carrier status is that the originating carrier pays the terminating carrier an access fee. The net amount paid between the carriers is termed the settlement. This process was common prior to divestiture.

²⁰ MCI, NPRM filing of November 8, 1992, to the FCC. This is the first filing requesting co-carrier status. As indicated before, co-carrier status, as sanctioned and authorized by the Commission, implies that all call terminating pay. This is a reciprocal process. If the calls are equally balanced in-bound and out-bound, then the access fees are de facto zero. This implies zero cost of goods and maximum competition.

The payments of settlements and the agreement between co-carriers to pay access to terminating carriers begs the question of access equality and fairness. As we have shown in an earlier section, a more efficient provider is taxed by the less inefficient, and in turn the inefficient is subsidized by the more efficient. In addition, if a carrier decides to offer service at a fixed fee, unlimited local usage, its costs of billing are de minimis. Thus its costs of settlement are significant.

The co-carrier status can work most effectively if and only if settlements, and thus access fees are eliminated. To summarize, this is because the fees are subsidies to the inefficient, and the imposition of the fees will create additional costs that the consumer must bear to clear the fee structure. Thus it is clear that the economically most efficient method is to eliminate access fees totally.

The RBOCs can use their monopolistic power in four ways to drive the bid price high: (i) *Access fees*, having bottleneck control over access from and to the user, (ii) *Auction "Tax"*; having a new entrant pay a cost of spectrum usage that they did not and will not have to pay, (iii) *Cost of Capital*, paying a greater cost of capital because of the greater risk associated with a new entrant, and, (iv) *Monopoly Rent*, having an existing monopoly rent advantage that allows them to bid excessively above free market value.

The concept of a bottleneck is based upon the theory that a single entity may be able, through nothing more than the intensive practice of its own business, to prevent or inhibit a competitor from entering the market, or after entering, from surviving.²¹ The issues of access fees as representing the cost of goods is the basis of such a bottleneck. The LEC, can, if not adequately monitored and instructed, establish such a bottleneck.²²

Antitrust issues relate to Sherman, Clayton, and especially to Robinson Patman.²³ The argument from a policy perspective, is one that considers the existing access provider, as a monopolist as one who can sell access at rate that could be in excess of costs, and internally may transfer price below LRMC. This is a difficult and cumbersome issue because of the actual measurement of the costs. Yet it is through this mechanism that such issue as antitrust behavior may result. The solution to this is also the elimination of access.

²¹ Tirole, pp. 194-195

²² Fisher, Tirole and Fudenberg and Tirole. These authors discuss the barriers to entry from an economic market perspective. McGarty and McGarty, *Information Infrastructures*, and Telmarc Telecommunications, November, 1992, also discuss these in detail.

²³ Areeda & Kaplow, pp. 923-925.

8. ADDENDUM: COMMENTS FROM "EX PARTE, PETITION TO CLARIFY ATTRIBUTION RULES, TELMARC, AUGUST 17, 1994"

The following are comments provided in the above named filing with the Commission and they go to the heart of the potential for Antitrust violations in the event that access is unfairly priced. This was filed as part of the PCS Docket 90-314 and also reflects the problems associated with RBOC consolidation and vertical monopoly formation.

"NATURE OF THE SERVICE

1.0 The delivery of telecommunications services, be they by wire or by wireless, are in effect the same services. They are the same as viewed by the consumer of these services even if they are implemented in a fashion that is different from the perspective of the provider. Standard wire based telephony is the same as cellular and is the same as any wireless based telephony.

Standard telephone service is the provision of voice and/or data communications in a fashion so that it may be delivered in a national network. The delivery of switched telecommunications can now be achieved via the existing telephone network, which is a monopoly, protected by the 1934 Federal Communications Act. There are new and innovative forms of technology that can and do deliver the same service. Cellular is one that has been in operations for over ten years and is a service and market controlled by eleven dominant players; the seven RBOCs (excluding Air Touch), GTE, McCaw (AT&T), Sprint, and Air Touch. A third alternative will be available in the next year or two, as approved by the FCC in its Fifth Report and Order dated July 15, 1994, namely, PCS, or Personal Communications Services.

1.1 PCS provides, at a minimum, the ability of any new entrant to deliver toll grade quality voice services in a seamless interoperable national network. This service or product offering is the provision, at a minimum, of voice grade service. It is the same as the service offered by the current Local Exchange Carriers, LEC, and is the same that could be potentially offered by the existing cellular carrier.²⁴

This states that PCS, and other wireless means for telephony, are nothing more than "plain old telephone service". It clearly has the potential of providing telephone service at a more competitive price than a wire based service. It is totally cross elastic with a wire based service. Namely, the consumer cannot differentiate with either offering other than possibly through the extra mobility afforded by PCS. In essence, PCS makes wire and wireless

²⁴ In McGarty, 1990 [1], the references being detailed at the end of this filing, the demonstration is made that the networks as evolved with wireless can be constructed in a fully open and distributed fashion. It was in this paper that the concept of commodification was first presented.

telephone service a simple commodity, indistinguishable to the consumer solely on the basis of the technology. The distinguishing feature will most likely be the price and only the price, as it is with all commodities. PCS allows for the commodification of local exchange service.²⁵

1.2 PCS, cellular, and wire based local exchange services are indistinguishable from the perspective of the buyer. Therefore, PCS can and should compete with the LEC and the wire based service.

If the intent is to create a competitive alternative to the local loop and, simultaneously, to expand the telecommunications services offered, then PCS offers a significant alternative means to do so.... If priced competitively, and positioned competitively, the consumer views PCS as a displaceable alternative to the wire based telephone.²⁶

1.3 The "Market" for PCS is the same as the "Market" for the LEC based services of today. The "Market" for cellular is the same as the PCS "Market".

There is no material or other observable or measurable difference in the offering of PCS and wire based service and the markets for both are the same. The consumer may choose between the two.²⁷

1.4 PCS enables the commodification of voice services and establish the possibility for any new entrant to sell the same service to the consumer, with the consumer purchasing the commoditized service solely on the basis of price. PCS allows for the total cross elasticity of supply to the consumer of telephone service.

It is argued that the service offered by the dominant entity or the RBOC LEC is fully displaceable by PCS and that as such competes with the LEC in its primary market.²⁸

1.5 New entrants into the PCS business do not face economies of scale in capital plant that have been faced by prior entrants, thus justifying the prior monopoly position of

²⁵ Telmarc Telecommunications, Inc., NPRM Comments to the FCC, November 9, 1992.

²⁶ Telmarc Quarterly Report, July 1, 1993, which details extensive market research in this area.

²⁷ The Court, in *United States v. E.I. duPont de Nemours & Co. (Cellophane)*, 351 U.S. 377 (1956), introduced the concept of cross elasticity to determine the market. Although there is no true market measure at this time, extensive market research indicates that there is anticipated to be great cross elasticity as defined by the Court in the aforementioned.

²⁸ In the decision of *Telex Corp. v. IBM Corp.*, 367 F. Supp. 258, 355-356 (N.D. Okla. 1973), the Tenth Circuit Court ruled that IBM had monopolized the market on the basis of the sale of peripheral products that were commodifiable in the terms in which we use herein.

the LEC. PCS entrants, by means of outsourcing, can also obtain all support and sales services at marginal prices and thus each Local Service Operator, LSO, does not have a scale economy in the operations and sales sides of the business. Thus there are no economies of scale in the PCS business and the justification for any monopoly player is no longer valid on economic principles.

It has been shown that new entrants have the ability to establish capital plant in such a way as to have marginal capital and average capital be almost the same at very small market penetrations, less than 0.5%. Thus there are de minimis scale economies in capital plant....

1.6 Competition in the PCS market, for voice amongst other services, will be commoditized and the consumer choice will be made on the basis of price, if such is possible. Choice on price for the consumer is Pareto optimal.

With the aforementioned characteristics, the product or service offering will be based upon price. New entrants will compete primarily on price, and their prices will reflect their costs. The consumer welfare is always maximized by maximizing choice while also minimizing price. Price could be so minimized in this market by having full competition and clearing the market on a fully competitive price basis.²⁹

MARKET FOR THE SERVICE

2.0 The market for the services may be described in terms of the sellers or in terms of the purchasers understanding of the product. Wireless is commoditized telecommunications and should not be differentiated from any other telecommunications services. With regards to the sellers, the RBOCs Local Exchange Companies, the LECs, have and continue to have a monopoly hold on the market. There are no significant competitors in this business other than the LECs controlled by the RBOCs.

In the duPont Cellophane case, the Court viewed the market for competitors as that which was cross-elastic, specifically, would the product that is sold substitute for the product that is offered.³⁰ In the case of the current wire based telecommunications services offered by the LECs, the provision of a wireless based substitute would be totally cross-elastic.³¹

²⁹ McGarty, 1993 [2] discusses the competitive aspects of fully competitive markets versus monopoly and duopoly markets. It is shown that in the current monopoly market the price is twice what it could be for telephone service in a competitive market. This fact has been borne out in the IEC market where long distance rates have been halved in the last ten years.

³⁰ U.S. v. E.I. du Pont, 351 U.S. 377 (1956)

³¹ Telmarc FCC Quarterly Report, July 1, 1993, which provides the market research on the cross-elasticity of wireless with wire based telephony.

In a similar fashion, the attempt to differentiate services on a geographical basis has also been dismissed by the Court in Grinnel.³² Furthermore, in Grinnell, the national nature of the service offering was taken into account. In telecommunications, there is both cross elasticity and the nature of the service is inherently national in scope. Thus any regional company is in reality providing a national service capability. It is virtually a national entity.

STANDING OF RBOCs AND GTE AS COMPETITORS

3.0 The Regional Bell Operating Companies and their cellular subsidiaries are not carriers as interpreted in terms of the FCC Act of 1934. The Bell Operating Subsidiaries, namely the twenty two operating companies are carriers so defined but are under the jurisdiction of the state Public Utility Commissions and not directly by the FCC.

The Act controls the effects of the Local Exchange Carriers acting as common carriers.³³ The LECs are separate subsidiaries of the RBOCs which are not themselves controlled by the Act. The mobile communications subsidiaries are also not controlled by the Act.³⁴

4.0 The limitations of Clayton § 7 regarding the exclusion of regulated entities from Clayton, relates to the Operating Companies under the direct control of the FCC. The RBOCs as entities, and the cellular companies as specific subsidiaries of the RBOCs are exempt from such FCC administrative oversight and thus are liable under the remainder of Clayton, and specifically Clayton § 7.

This follows from the above argument as a corollary thereto.

5.0 The merger of NMCC and BAMS implies a merger of interests in NYNEX and Bell Atlantic respectively. Bell Atlantic and NYNEX currently compete, through their Operating Companies, in the New York market, via the "Corridor" agreement. Specifically Bell Atlantic can sell access in the New York market by means of the

³² U.S. v. Grinnell, 384 U.S. 563 (1966). Justice Fortas' dissent on Grinnell was based on the local nature of the service. The majority argued that the service was essentially a national service and that must be taken into account.

³³ §202 of the Federal Communications Act (1934, as amended).

³⁴ See U.S. v. Pan American World Airways, 371 U.S. 296 (1963) wherein the Court recognized the control by the CAB but that it was the prime action of the airlines as an entity controlled in its primary business thereto. In U.S. v. RCA, 358 U.S. 335 (1959) the Court recognized the power of the courts to revoke a license granted by the FCC, thus indicating a capability over and beyond the Commission in such cases. We argue that the FCC has statutory power only regards the LEC common carriage function. We argue that the non-Common Carrier functions are therefore not so protected.

"Corridor" agreement and NYNEX could in return. Bell Atlantic does so at the current time.

The Corridor Agreements preceded and survived the MFJ and allowed the two carriers to provide services in each others regions on a competitive basis.....From the Court's decision in Falstaff, it is clear that the Court perceives that such elimination of even a potential competitor is in violation of the antitrust statutes.³⁵

6.0 From a geographical perspective, and in view of the "Corridor" agreement, the merger is implicitly a Horizontal merger amongst the dominant monopoly players in these markets. This represents an example wherein the RBOCs will have established greater control over the market, which can only be aggravated if they further control Designated Entities.

Bell Atlantic and NYNEX have a unique agreement that passed through the Modified Final Judgment, the Corridor Agreement. This allows Bell Atlantic to sell service in New York from New Jersey and likewise for NYNEX to sell services in New Jersey. The merger of these two entities would combine these markets, de facto, and would thus reduce what semblance of competition could result. The Court has ruled that such reduction of competition is in violation of the Antitrust laws.³⁶

ANTI-COMPETITIVE POTENTIAL

7.0 The Existing Entities control many of the means of production, including but not limited to the access fees.

There are four sets of players in the wireless market characterized by their market power. The first are the *Existing Entities*, namely the RBOCs and GTE, who each and together have significant market power through their existing monopoly presence. The second are the IECs and other existing communications entities who provide telecommunications services but have no control over local access.³⁷ Third are the non telco players such as the CATV and utility companies. Fourth are the Designated Entities such as small businesses, women and minority companies. Of these four classes, only the *Existing*

³⁵ U.S. v. Falstaff Brewing Corp., 410 U.S. 526, 532-533 (1973).

³⁶ *ibid.*

³⁷ This would include AT&T, MCI, Sprint, as well as the new entities such as Columbia PCS, a new PCS entrant backed in part by Fidelity investments, a participant in SMR and other telecommunications services. The designated entity companies are true small businesses, women or minority owned businesses as specified by the Commission, unlike the aforementioned players.

Entities control access, a key means of production for the delivery of the basic telecommunications services....

The Parties argue that there is only one view of access that is consistent with a competitive environment and does not create the potential for anti-competitive actions on the part of the Existing Entities, specifically, the provision of access in a fully competitive environment which implies the total elimination of access fees. Under that condition, the cross control from the LEC to the wireless entity is eliminated and competition is more likely to result....

7.1 The Existing Entities have control of almost 100% of the market in wire based distribution of the telephone service, with some diminution due to local bypass entities. The existing entities have control over almost 75% of the current wireless market as a means of distribution of telephone services.³⁸

There is some mis-perception that the cellular carriers differ in some way with PCS. The cellular carriers, having 25 MHz of spectrum each, half of which was given to the RBOCs free of any cost.... Pac Tel had stated in 1990 that they could provide service to all of Los Angeles using CDMA and the existing 25 MHz 800 MHz spectrum.³⁹

7.2 Telephone services, as a commoditized entity, do not differ in any way if delivered by a wire or wireless means. The consumer perceives the service as the same in either case. Thus there is complete cross elasticity in a commoditized market.

7.3 The delivery of telephone service, when differentiated by wire based or wireless, is the same service but sold through a different sales and marketing channel. There is no basic product differentiation between a wire based service and a properly delivered wireless service. The only difference is price as reflected throughout the distribution channel.

The essence of what makes wireless and wire based services different is merely the sales or distribution channel....

7.4 The current wireless market is controlled by Duopoly Players, one being an existing entity, called the B side wireline carrier, who was granted at no cost the 25 MHz of spectrum, and another A side player, called the non-wireline player. More than 50% of the current wireline players are existing entities, namely RBOCs or GTE. All of

³⁸ Wireless Communications; Donaldson, Lufkin & Jenrette, Report, Summary, 1994.

³⁹ Statement of Craig Farrill, Vice President of Pac Tel, at CTIA in January 1991, talking on their choice of CDMA, as related by Farrill to the author in June of 1991.

these entities may deliver a telephone service comparable to that on the wire based side. Some of them currently do.

The current cellular market is at best a duopoly and in some sense a monopolistic market....

8.0 The value of a telecommunications property is dependent on the net present value of the property. That value is a function of the revenue, expenses, capital, auction fee, access fee, and cost of capital as perceived by the bidder. If all operators face the same revenue stream, capital requirement, and expense stream, the property values will reflect access fee, auction fee, and cost of capital differences. This will advantage those with low costs of capital and control over access.⁴⁰

The existing entity may have the ability to use their existing monopoly powers to ensure preservation of their monopolies in the upcoming bidding for wireless licenses. This would create a new barrier to entry to any new entrants, and continue the existing barriers to entry. The existing entities face the lowest cost of capital of any provider and in addition have a monopoly rent value that increases their valuation per PoP...

9.0 Access Fees are a key means of production. They are currently viewed as a means of compensating the RBOC for use of its facilities and payment for certain yet to be defined network externalities. Access fees include the costs of interconnect plus other costs and services that go beyond interconnect. Access fees are not unbundled costs for interconnect.⁴¹

The RBOCs have bundled many costs into access...

9.1 Competition from other entities, specifically the designated entities, who may perform of their lower operating costs and lower cost for infrastructure capital, may be able to offer a more competitive service than any other entity if they were to obtain a license.

⁴⁰ Such an action, if actually exercised, is predation.

⁴¹ As shown in McGarty, 1993 [1] through [4], and 1994 [1], access fees tie together elements such as interconnect, R&D, sales and services, and other elements of the telephone companies services, and have been indicated as such by the LECs in filing to various Public Service Commissions. Interconnect is what is sought, and unbundled from any and all other elements. It can be argued that this "tied" offering, which provides ability for interstate traffic and commerce, which is not expressly conveyed to the access buyer, which can be separated into a multiplicity of products as evidenced by the actions of Ameritech, and over which the LEC has significant economic power to control both availability and price, and which ostensibly has not clear business justification, implies that access fees are potentially tying claim, as per *Jefferson Parish Hospital No. 2 v. Hyde*, 466 U.S. 2 (1984).

...Although there is intent to create competition, and although the RBOCs, as common carriers, are potentially, and in part, protected from antitrust violations by the controls in the 1934 Act, the state of telecommunications after a free and open auction may be drastically different. It is clearly to the RBOCs advantage to merge, to integrate, to improve the position of their existing channels, and to perform other acts that ensure them greater share of the market prior to the entry of any competition.⁴² This is the same set of issues that were prevalent in the 1970s during the early stages of the AT&T breakup.⁴³

REQUEST OF THE PARTIES

The Parties request that the Commission reaffirm its position on the establishment of sham backings for the sole purpose of sustaining a monopolistic control over the business. The parties hereby request that the Commission reaffirm its intent, as stated in the Fifth R&O, that there shall be no shams or fronts, especially for the RBOCs, whose presence could merely continue the monopolistic practices and eliminate any form of competitive element in local exchange.

Specifically, the Parties request that the Commission clearly reaffirm and support the fact that:

- 1. Control by an dominant entity, namely RBOCs or GTE, in any fashion significant to effect undue pressure on any Designated Entity be found to be in opposition to the current attribution rules.*
- 2. That control by secondary means, that is through service agreements that are more than of the standard form, be forbidden as part of the attribution rules..."*

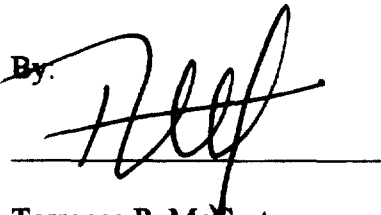
⁴² Recent pricing of cellular at such rates as \$29.95 per month for unlimited local service in Boston by Southwestern Bell is an example of pricing to obtain market share. Recent estimates put Southwest in Boston at almost 400,000 subscribers of a market of 4 million, almost 10% market share. It will be very difficult for any new entrant to get that share away from them. In addition, although Telmarc has been arguing for access fee elimination in Massachusetts, neither the NYNEX Mobile company nor Southwestern have raised that issue, as a means to provide a more competitive service. In a duopoly market, such a fee is common to both players and is not a barrier. In a fully competitive market, this would change. The Parties argue that the fact that NMCC in the Massachusetts market has not attempted to act as a LEC implies that NMCC cannot and does not act independently of the LEC portion of NYNEX and that in what can be observed externally, the LEC interests dominate even over the unregulated and non-LEC operations.

⁴³ Temin, P., *Fall of the Bell System*, Cambridge, 1987, p. 129. Here the author recounts Van Deering suggestions of abandoning FCC control and oversight and reintroducing the antitrust laws which control competitive markets. It can be argued that the same effect is taking place here.

Respectfully submitted,

COMAV, LLC
and
The Telmarc Group, Inc.
February 26, 1996

By.

A handwritten signature in black ink, appearing to read 'T. McGarty', is written over a horizontal line.

Terrence P. McGarty
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Dated: February 26, 1996

CERTIFICATE OF SERVICE

I, Terrence P. McGarty, hereby certify that a copy of the foregoing has been sent by United States Postal Service Express Mail with Next Day Delivery (*) or by United States mail, first class and postage prepaid, to the following on this day February 26, 1996

The Honorable Reed E. Hundt (*)
Chairman,
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The Honorable Rachelle B. Chong (*)
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1919 M Street, N.W.
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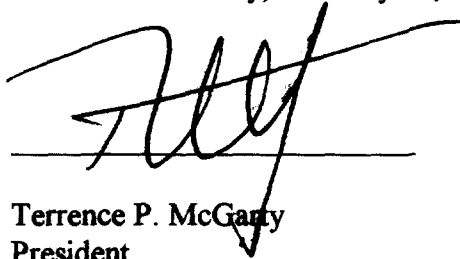
The Honorable James H. Quello (*)
Commissioner,
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, D.C. 20554

The Honorable Susan Ness (*)
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

The Honorable Andrew C. Barrett (*)
Commissioner,
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554

Dr. Robert M. Pepper, Chief (*)
Office of Plans and Policy
Federal Communications Commission
1919 M Street, Room 822
Washington, D.C. 20554

Attested to this day, February 26, 1996



Terrence P. McGarty
President,
COMAV, LLC and The Telmarc Group, Inc.

References

ⁱ The following are publications are related to the issues we have discussed before:

1. Alternative Networking Architectures, McGraw-Hill (New York), 1992.
2. Wireless Communications Economics, Advanced Telecommunications Institute Policy Paper, Carnegie Mellon University, February, 1992.
3. Communications Network Morphological and Taxonomical Policy Implications, Telecommunications Policy Research Conference, Solomon's Island, MD, September, 1992.
4. Architectures et Structures de L'Information, Reseaux, No 56, pp. 119-156, December, 1992, Paris.
5. Economic Structural Analysis of Wireless Communications Systems, Advanced Telecommunications Institute Policy Paper, Carnegie Mellon University, February, 1993.
6. Access to the Local Loop; Options, Evolution and Policy Implications, Kennedy School of Government, Harvard University, Infrastructures in Massachusetts, March, 1993.
7. Wireless Access to the Local Loop, MIT Universal Personal Communications Symposium, March, 1993.
8. Spectrum Allocation Alternatives; Industrial; Policy versus Fiscal Policy, MIT Universal Personal Communications Symposium, March, 1993.
9. Access Policy and the Changing Telecommunications Infrastructures, Telecommunications Policy Research Conference, Solomon's Island, MD, September, 1993.
10. Internet Architectural and Policy Implications, Kennedy School of Government, Harvard University, Public Access to the Internet, May 26, 1993.
11. Wireless Architectural Alternatives: Current Economic Valuations versus Broadband Options, The Gilder Conjectures; Solomon's Island, MD, September, 1994
12. From High End User to New User: A New Internet Paradigm, MIT Press (Cambridge, MA), 1995.

ⁱⁱ The following are FCC Filings made by Telmarc in prior FCC Dockets and as ex Parte and referred to herein:

1. PIONEER PREFERENCE FILING, MAY 8, 1992.
2. PIONEER PREFERENCE COMMENTS, JUNE 23, 1992.
3. NPRM COMMENTS, NOVEMBER 8, 1993.
4. NPRM REPLY COMMENTS, DECEMBER 12, 1992.
5. EX PARTE, DECEMBER 21, 1992
6. NPRM JOINT COMMENTS, JANUARY 12, 1993
7. EX PARTE, FEBRUARY 17, 1993

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8. EX PARTE, MARCH 29, 1993
 9. LICENSE FILING, MAY 8, 1992
 10. LICENSE AMENDMENT, OCTOBER 15, 1992
 11. LICENSE FILINGS, APRIL 19, 1993
 12. JOINT NPC FILING, JULY 29, 1993
 13. FIRST QUARTERLY REPORT, JANUARY 1, 1993
 14. SECOND QUARTERLY REPORT, APRIL 1, 1993
 15. THIRD QUARTERLY REPORT, JULY 1, 1993.
 16. FOURTH QUARTERLY REPORT, OCTOBER, 1, 1993
 17. COMMENTS ON IMPLEMENTATION OF SECTION 3(N) AND 332 OF THE
COMMUNICATIONS ACT, NOVEMBER 8, 1993.
 18. COMMENTS ON THE IMPLEMENTATION OF SECTION 309(J) OF THE COMMUNICATIONS
ACT, NOVEMBER 10, 1993.
 19. FIRST QUARTERLY REPORT, JANUARY 1, 1994.
 20. SECOND QUARTERLY REPORT, APRIL 1, 1994.
 21. EX PARTE, DOCKET 90-314, AUCTIONS, APRIL 19, 1994.
 22. EX PARTE, DOCKET 90-314, SET ASIDES, MAY 30, 1994.
 23. EX PARTE, DOCKET 90-314, PCS, COMPETITION AND ACCESS FEES, MAY 30, 1994.
 24. THIRD QUARTERLY REPORT, JULY 3, 1994.
 25. EX PARTE, PETITION FOR CLARIFICATION, BIDDING RULES, AUGUST 17, 1994.
 26. EX PARTE, PETITION TO CLARIFY ATTRIBUTION RULES, AUGUST 17, 1994.
 27. EX PARTE, PETITION TO CLARIFY ATTRIBUTION RULES, AUGUST 26, 1994.
 28. RESPONSE TO FCC NPRM WT 96-6 BY THE TELMARC GROUP, INC, FEBRUARY 26, 1996.